

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

GENO JOSEPH MARCONI

Case No. 218-2024-CR-01426

**STATE'S OBJECTION TO MOTION FOR JUDICIAL NOTICE
AND JURY INSTRUCTION**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and objects to Defendant's Motion for Judicial Notice and Jury Instruction. In support thereof, the State represents as follows:

1. Defendant's Motion requests that this Court instruct the jury relative to RSA 12-G:43 and RSA 12-G:44 for the issue of whether B.C. was "a person known by [Defendant] to be an unauthorized person." See Motion at ¶¶ 1-13. Defendant asserts that in addition to proving the statutory elements of the offenses charged, the jury must also be instructed that "providing records pertaining to N.L. to another individual, B.C. was not authorized by either RSA 12-G:4 or RSA 12-G:44." Motion at ¶¶ 10-11, 13.

2. Defendant has not filed notice of a mistake of law defense pursuant to RSA 626:3, II, and the Motion does not allege that Defendant intends to rely on such a defense at trial. Accordingly, the requested judicial notice and jury instruction would be improper to negate Defendant's subjective belief about whether B.C. was an unauthorized person.

3. Defendant's Motion must therefore seek the judicial notice and jury instruction relative to a possible defense that Defendant was authorized to make the disclosures to B.C. as alleged. However, it is not clear whether this defense would be a "theory of defense" on the legal status of B.C. a "theory of the case" based on disputed facts. *See, e.g., State v. Ramos*, 149 N.H. 272, 274 (2003).

To use . . . a theory of defense, the defendant ha[s] to present evidence admitting the substance of the allegations against him, but point[] to facts which otherwise excused, exonerated or justified his actions, precluding criminal liability. In other words, the defendant ha[s] to present evidence showing a different legal significance for the facts alleged against him, in order to use . . . [a] theory of defense. In contrast, to have presented . . . [a] theory of the case, the defendant only had to present evidence of a different factual scenario than that presented by the State, and then argue how the facts and evidence should be evaluated or interpreted by the jury.

Id. (citing *State v. Bruneau*, 131 N.H. 104, 117-18 (1988)).

4. Under these distinctions, if Defendant denies committing the disclosures to B.C., the requested judicial notice and jury instructions would be improper under this theory of the case. However, if Defendant, through his Motion, wishes to have the Court take judicial notice of the statutes involved and instruct the jury as requested, this would have to be a theory of defense, and Defendant would first need to "admit[] the substance of the allegations against him, but point[] to facts which excused, exonerated or justified his actions, precluding criminal liability" under the statutes involved. *Id.* That is, Defendant would have to admit to making the disclosures to B.C., but claim that B.C. was an authorized recipient. However, the requested statutes do not make B.C. a legally authorized person and do not provide Defendant with a mistake of law defense pursuant to RSA 626:3, II. Accordingly, instructing the jury on these statutes for the purposes of incorrectly implying that B.C. was an authorized recipient would be improper statements of the law.

5. The New Hampshire Supreme Court discussed the distinction between a “theory of defense” and a “theory of the case” in *State v. Small*, 150 N.H. 457 (2004). In *Small*, the defendant argued that under *State v. Demeritt*, 148 N.H. 435 (2002), he was entitled to an instruction on his defense of “legitimate purpose” to a charge of Stalking. *Small*, 150 N.H. at 461. See *Demeritt*, 148 N.H. at 445 (“[T]he court must grant a defendant’s requested jury instruction on a specific defense if there is some evidence to support a rational finding in favor of that defense.”) (quotation omitted). However, the State argued, and the Court agreed, that the defendant’s reliance on *Demeritt* was “inappropriate because [the defendant’s] theory of a ‘legitimate purpose’ was not in the nature of a legal defense.” *Small*, 150 N.H. at 462. Rather, the Court agreed with the State that *Ramos* was more analogous “because the defendant denied essential allegations against him.” *Id.* The Court found that “[a]s in *Ramos*, ‘the defendant ha[d] mistakenly characterized his theory of the case as a theory of defense.’” *Id.* (quoting *Ramos*, 149 N.H. at 274). “Accordingly, the defendant was not entitled to an instruction on [his] defense under *Demeritt*.” *Id.* (citing *Bruneau*, 131 N.H. at 118).

6. Applying this logic to the indictments against Defendant and Defendant’s Motion, the following analyses would apply:

(a) Defendant denies any or all factual allegations in the indictment, including but not limited to denying knowing that B.C. was an unauthorized recipient. Any defense relative to the relief requested in the Motion would be a theory of the case and the jury instructions and judicial notice would be improper, as only Defendant’s knowledge would be relevant, and as Defendant has not filed a notice of mistake of law defense under RSA 626:3, II. The judicial notice and instructions would create the mistaken impression that B.C. was an

authorized recipient under these laws, and Defendant is not entitled to this instruction on such a theory of defense.

(b) Defendant admits to the factual allegations in the indictment but asserts a theory of defense that B.C. was an authorized recipient. The relief requested in the Motion may be appropriate.

7. Accordingly, this Court (like the Court did in *Small*) should determine whether: (1) the defendant wishes to admit to the conduct alleged and asserted a theory of defense (like *Demeritt*), in which case the relief requested in the Motion may be appropriate; or (2) the defendant has denied the essential allegations against him and asserted a theory of the case and deny the relief requested (like *Ramos, Small*).

8. If Defendant wishes to admit to the factual allegations but assert a theory of defense, Defendant could do this by stipulating to committing the conduct as alleged pretrial, and the parties could try the sole issue of whether B.C. was an unauthorized person before a jury (or bench) trial with the instructions and judicial notice requested based upon Defendant's theory of defense.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

- (A) Hold any ruling on Defendant's motion in abeyance; and
- (B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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Date: June 17, 2025

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via the Court's e-filing system to counsel of record.

/s/ Joe M. Fincham II
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